NO. 44331-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ALAN OLSON,

Appellant.

BRIEF OF RESPONDENT

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for Respondent

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III. STATEMENT OF FACTS

The State proceeded to trial against the Defendant for one count of Assault in the second degree or as a lesser-included offense, assault in the fourth degree for strangulating his girlfriend Cathy Everett. Ms. Everett was not called as a witness in the State's case. The State presented evidence from the 911 call, the officer who responded to the scene, and the neighbor whom Cathy Everett ran after the assault.

The neighbor, Rosemary Arbuckle testified Cathy Everett appeared at her back door in a total panic repeatedly asking Rose to help her. RP 152-53. It appeared Cathy ran from her apartment and jumped the cyclone fence separating the two apartments. RP152-53, 158. After Rose met Everett at her back sliding door, Cathy asked Rose to call 911. RP 153. Cathy told Rose Olson choked her with her negligee and she passed out. RP 154. When she woke up, Olson and her baby were gone. RP 154. Rose dialed 911 and handed Everett the phone. RP 154. Everett was still in a panic when she spoke to 911. RP 154-55.

The State played the 911 call. RP 160. Everett, sobbing, told dispatch, "my daughter's dad just choked me out and I just woke up. He's leaving with my daughter." RP 160. She continued saying, "[m]y daughter's dad just got through beating me up and he choked me out and I

went unconscious and I just woke up." RP 160-61. She said the fight happened just five minutes prior, she was unconscious for a minute or two, and she didn't want to go back. RP 161-62.

Officer Dave Shelton testified at trial. As part of his training and experience, Officer Shelton talked about the particular behaviors in domestic violence cases that he pays attention to. Some of those things are whether the couple has been together for a long time, if the victim depends on the suspect for money and other things, that the victim can change their story or change their mind at different points in the investigation, and that the victim can become violent when the suspect is taken away. RP 99. Officer Shelton testified that in domestic violence cases he is looking for injuries to both parties, items that are thrown around, broken items, torn clothing, etcetera. RP 100. He also stated he tries to determine what a victim originally says about the event. RP 101. Shelton stated:

> Usually originally what they say, they're still caught up in the excitement of the incident being the victim, you know, reaching out for help and that usually ends up being closest to the truth of what happened. Because sometimes later when they have time to think about it, they they'll, you know, sometimes change their story when they're like thinking that well.

RP 101. He said later he asks for a written statement from a victim, however, written statements are difficult to obtain when he waits. RP 101-

02. After talking of his training and experience he described what happened.

Shelton was called out at 7:14 pm. RP 109. He met Cathy Everett within minutes and noticed she was visibly upset, with fresh and obvious injuries. RP 110. She appeared still be under the excitement of the event. RP 110-12. Shelton described her injuries as a severe bump on her forehead and abrasions on the side of neck and face. PR 112. He elaborated that she had redness by her ear that went up to the bump on her head. RP 114. On the opposite side of her body, the redness and abrasion from her neck went up to her hairline. RP 115-16. Shelton testified that the mark on Everett's neck was not inconsistent with strangulation. PR 116. He also testified to potential marks a piece of fabric or clothing could make on the human body. RP 116-117. He testified Everett pointed out a negligee to him on the floor that was consistent with the marks on her body. RP 120. He also found torn men's clothing. RP 141. After contacting Everett, Shelton contacted Olson. He did not observe any injuries on Olson, but did notice one arm was in a cast. RP 133-34.

During cross-examination, defendant elicited Officer Shelton's training to pick up cues for people that are telling lies. RP 143. One of those can be when a person looks down or breaks eye contact. RP 144.

Earlier Shelton testified Everett looked down when he attempted to collect her written statement. RP 138

The defendant called Judy O'Neill, a defense investigator, to testify Everett told O'Neill that she shoved Olson, causing him to fall backwards. RP 179-180. Everett then shoved Olson again and he put his hands on her throat. RP 179-80, 183. Everett said Olson did not choke her and never used the negligee. RP 180. She said they were arguing over someone having an affair and she wanted him arrested. RP 181. Upon cross, O'Neill admitted Everett said Olson grabbed her neck out of anger. RP 185. O'Neill never questioned Everett about her injuries. RP 191.

The defendant's family testified Everett had hurt Olson many times in the past and caused injuries. RP 195-212. Everett testified for Olson. RP 244. She indicated she and Olson were together for about five years and they had a child in common. RP 244. Everett testified she verbally lashed out at Olson when he came home. RP 246. She pushed him with her fingers in his chest and he put his arms up. RP 248. They got into a wrestle and he was trying to prevent her from yelling and shoving him. RP 248. Everett said Olson was holding her down and she got a scratch on her neck from the Defendant's cast. RP 248, 262. Olson left, she calmed a bit, and then went to the neighbor's to call the police. RP 249. Everett said she was upset and was willing to do anything or say

anything to make Olson look bad so she could get her daughter. RP 250. She denied that Olson choked her. RP 250.

Under cross-examination, Everett admitted she was not cooperative with the State and only came to court at defense counsel's behest. RP 252-53. She admitted the fight was over her having an affair, and Olson was upset. RP 253-56. She couldn't remember what his face looked like during the argument or while wrestling. RP 259. She explained she had the bump on her forehead from a previous injury where she tripped and fell, hitting her face on the ground. RP 263-65. She also got a mark under her nose, her right cheek and left cheek and on her nose from the fall. RP 265. Everett did admit she ran and hopped the fence to Rose's house, ripping her pants in the process. RP 268. However, she didn't remember what she told Rose or 911 about the assault. RP 269. Everett remembered Officer Shelton arriving and through tears, telling him of the events. RP 272-76. Everett said she lied to Officer Shelton when she told him she was strangled and pointed out the negligee. RP 272-73. Everett also denied telling O'Neill that Olson ever put his hands on her throat. RP 281.

Olson testified when he came home Everett was upset and accusatory. RP 293. Everett jabbed her finger in his chest, shoved him, pushed him and punched him a couple of times. RP 294-96. He used his

cast as a shield. RP 297. During the process he stumbled to the floor and she continued to attack him. RP 297. He did say he tried to restrain her by pushing near her neck area. RP 298. He then fled the house. RP 299. He later spoke to Officer Shelton about the events. RP 344-47. At no time in his conversation with Shelton did he mention self-defense. RP 349, 382. Additionally, Olson did not take any photos of his alleged injuries that evening. RP 353.

Olson also testified to a number of incidents where Everett was violent toward him. RP 303-316. He indicated he had witnesses to some of the events and talked to both his brother and sister about testifying at trial and presented photos of prior injuries. RP 324, 326, 329, 331. Olson also stated that he went to a friend's house the night of the incident, Brian Denlocker. RP 342-43.

During cross, Olson admitted he lied to his siblings about how he previously broke his hand.[1] RP 354. Additionally, he was not able to pinpoint the date of the alleged previous assault by Everett, although he could have easily had this information by consulting his medical records. RP 355. Defendant admitted that he knew for a week prior to testifying that he would testify and be asked questions about the previous assaults. RP 356. He explained he did not prepare or bother to give accurate

[1] He testified Everett broke his hand in a previous assault. RP 313.

information to the jury as he believed the State would drop charges. RP 356-57. On re-direct defense counsel asked if Mr. Denlocker could be present to testify and asked if defendant gave his information to defense counsel. RP 358-59. When defendant found out Denlocker was unavailable, he gave counsel the names of his brother and sister that could testify to the prior injuries. RP 359. It was only on re-cross that the State walked through the door defense counsel opened by asking when he gave counsel Denlocker's information. RP 362-63. The following exchange took place:

> Q: Okay. When did you tell him about Mr. Denlocker?
> A: I don't know. Maybe a month ago. Three weeks ago, maybe.
> Q: So three weeks to a month ago. Isn't it true that you've known your trial date for over that time?
>
> A: Yes.
> Q: Okay. And you were aware of both your brother, your sister, and ...Ms. Denlocker at the time you were arraigned?
> A: Yes.
> Q:...And you were present at pre-trial, were you not?
> A: I was.
> Q: And you, at that time, were well aware that your attorney told in open court that you had no witnesses, correct?
> A: I'm not sure what my lawyer said in open court. I'm...
> Q: You weren't paying attention?
> A: Again, that was months ago. I'm not exactly sure what my lawyer said verbatim.

The State pointed out that pre-trial was just a little over a month prior to trial. RP 364. Additionally that Olson met with his attorney prior

to that day and knew it would be important to let him know about any witnesses for his defense. RP 364. He believed he told his attorney about Denlocker prior to pre-trial, but didn't contradict his attorney that he had no witnesses to present. RP 365. Defense counsel on his second re-direct elicited from Olson that he wasn't familiar with the court proceedings and didn't understand them completely. RP 366-68.

Prior to closings, the court indicated to counsel the bailiff told the court the jury already asked to listen to the 911 tape again. RP 392. There is nothing to indicate when this request was made by the jury, but the matter was raised after the parties closed the evidentiary part of the case. RP 388. The parties discussed the logistics of playing the CD in part. RP 392. The State indicated that it intended to play the first portion of the tape during its closing. RP 393. The State proposed playing the recording prior to closings and then begin closing argument. RP 393. The defendant did not object. RP 393, 400.

During closing argument, the State first reviewed the charges, the elements of the offenses, and the State's evidence. RP 423-431. The prosecutor argued if the jury was convinced by Everett's initial statements of what happened, there was sufficient evidence of assault. RP 431. She pointed out that the Defendant presented testimony from O'Neill and Everett that contradicted the initial statements Everett made and each

other. RP 433. The state moved on to discuss the law on self-defense. It read the instruction on lawful force out-loud to the jury. RP 436. The argument proceeded that Olson never admitted to strangling Everett, so he could not claim self-defense to the Assault charge. RP 437. As such if the jury believed he strangled Everett, he could not claim self-defense, and he was guilty. RP 437. Moreover, while the state must prove the assault was not lawful, when a defendant raises self-defense, the jury is entitled under the instructions to determine if he is credible. RP 437, 440, 442. The State reminded the jury, Olson was not required to put on any evidence, but if he decided to do so, they weigh his evidence as they would any other. RP 438. The State encouraged the jury to look at the defendant's statements to see if they made sense. RP 438.

The State then picked apart the defendant's statements factually, and ends by saying when Olson says he puts his hands out and Everett runs into them, that is not self-defense. RP 436. The State repeatedly reminded the jury that it was the State's job to show the force was not lawful. RP 437, 440, 442. However, also said it didn't have to disprove the defendant's story if his story wasn't credible in the telling. RP 442.

The jury being unable to decide as to the charge of Assault in the second degree, found Olson guilty of Assault in the fourth degree. CP 15.

IV. ARGUMENT

I. THE STATE DID NOT COMMIT PROSCUTORIAL MISCONDUCT.

a. Standard of Review

When a defendant alleges prosecutorial misconduct, it is the defendant's burden to establish the impropriety of the comments as well as their prejudicial effect. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009); *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005) citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The court reviews alleged improper remarks in the "context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Anderson*, at 427, citing *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). If the statements are improper and an objection was made, the court considers whether there was a substantial likelihood the statements affected the jury. *Id.* If the defendant failed to object or request a curative instruction, the defendant waives the issue, unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *Id.* Moreover, the failure to object to a prosecutor's statement "suggests that it was of little moment in the trial." *State v. Curtiss*, 161 Wn. App. 673, 699,

250 P.3d 496 (Div 2, 2011) citing *State v. Rogers*, 70 Wn.app. 626, 631, 855 P.2d 294 (1993) rev. denied 123 Wn. 2d 1004, 868 P.2d 871 (1994).

b. The State did not shift the burden of proof in cross-examination of the Defendant

The State is afforded great latitude in making arguments to the jury and reasonable inferences from the evidence. *Id.* citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). An argument commenting on the quantity and quality of the defendant's evidence does not automatically result in burden shifting. *Id.* Moreover, "[w]hen a defendant in a criminal case takes the stand, he is subject to all the rules relating to the cross-examination of other witnesses." *State v. Jeane*, 35 Wn.2d 423, 431 (1950), *State v. Hobbs*, 15 Wn.App. 866 (Div 2, 1975). A defendant cannot hide behind the 5th Amendment right to silence and against self-incrimination when they voluntarily take the stand. *State v. Robideau*, 70 Wn.2d 994, 1001, 425 P.2d 886 (1967). "Any fact which diminishes the personal trustworthiness of the witness may be elicited if it is material and germane to the issue." *Id.* at 998-999.

In *State v. Robideau*, the defendant raised an alibi defense to the charge of robbery. *Id.* at 995. The State had six eye witnesses who identified the defendant. *Id.* The defendant testified he had not left a particular house the day of the robbery. *Id.* Upon cross-examination the

defendant admitted he had not told the police he was at the house all day. *Id.* Defense counsel objected to the question at the time. *Id.* The Washington Supreme Court held, "[I]f a defendant raises a defense of alibi, then cross-examination relative to whether he told any police officers where he was on the day the crime was committed would be material and germane, because it would bear upon the question of whether his alibi was a recent fabrication. Here the question was material and within the scope of the direct examination." *Id.* at 998.

Mr. Olson argues the prosecution's questions concerning evidence of his self-defense claim were improper. On direct, Olson testified Everett previously assaulted him on many occasions and provided some photos of previous injuries taken by family and police. RP 308-310. One of the assaults involved her breaking his arm in July 2012. RP 313. Olson testified he sought medical attention for this injury. RP 313. Another was in January 2012 when Everett scratched and injured him and he was arrested for the assault. RP 323. He testified on the night in question Everett attacked him, tried to scratch, bite, and punch him. RP 294-96. He in an effort to restrain her, pushed her off him in her shoulder and neck area. RP 297-98. Olson identified a piece of his torn boxer shorts from the scene and guessed they were torn during the fight. RP 302. He could

not remember whether he was wearing those shorts during the fight. RP 302.

In every instance Olson claims the prosecution improperly questioned the Defendant, the Defendant testified about the events on direct examination. He in some, but not every instance provided photos of his injuries. Additionally, he indicated he waited to seek medical attention, but couldn't remember the date. RP 355. The State's cross-examination about his failure to produce photos in some instances of claimed injuries was proper. Additionally, questioning the defendant's memory of the events is proper, especially in light that he would have access to information in order to refresh his recollection (his medical records) and failed to prepare for testimony. Under *State v. Robideau*, 70 Wn.2d 994, 1001, 425 P.2d 880 (1967), Olson cannot hide behind the privilege of the 5th Amendment to prohibit cross-examination on topics he introduced. The State's questions were relevant to his credibility, were within the scope of his direct examination, and material. Lastly, the Defendant cannot show an objection and curative instruction would not have cured any prejudice.

The Defendant also asserts the State committed misconduct by questioning the Defendant's "decision to testify." Def. Brf. at 15. The State at no time questioned the Defendant's decision to testify, and the

representation as such misconstrues the facts. The Defendant testified on direct and re-direct as to the evidence he could offer from other witnesses and that a Mr. Denlocker was unavailable to testify. RP 324, 326, 329, 331. The State on re-cross questioned when this information was available to the Defendant as it was not previously indicated at pre-trial. The Defendant opened the door to this inquiry and cannot hide behind his 5th Amendment rights not to testify. The question was relevant to whether his self-defense claim was a recent fabrication.

Moreover, statements made at an omnibus or pre-trial hearing in which the defendant is present can be treated as adopted admissions and used against a defendant as impeachment. In *State v. Rivers*, 129 Wn.2d 697, 709, 921 P.2d 495 (1996), the Washington Supreme court allowed the State to impeach a defendant with defense counsel's opening statement. The Court held that statements are admissible for impeachment or to discredit the defendant's case. *Id.* Additionally, in *State v. Dault*, 19 Wn.App. 709, 578 P.2d 43 (Div. 3, 1978), the court allowed the State to impeach a defendant with his attorney's statement of defense at the omnibus hearing. The court stated "that the [discovery] rules merely allow[] for an accelerated disclosure of information which must ultimately be revealed, and that their purpose was to prevent last-minute surprise,

trial disruption, and continuances and to encourage the early disposition of the cases through settlement." *Id.* at 717.

In the present case, Olson did not disclose the witnesses at pre-trial. As such the State was entitled to use the late disclosure to question the credibility of his self-defense claim.

c. **The State did not shift the burden in closing argument**

The defendant additionally asserts the State shifted the burden of proof in its closing argument. The defendant testified he did not strangle Everett. RP 297. The State's evidence was the defendant strangled Everett until she passed out. RP 160-162. In closing, the State argued if the jury believed the State's evidence of strangulation, the Defendant's claim of self-defense did not control. RP 437. This is an accurate statement of the law. Generally, a defendant is only entitled to a self-defense instruction if they offer credible evidence tending to prove self-defense. *State v. Dyson*, 90 Wn.App. 435, 438, 952 P.2d 1097 (1997). When a defendant claims a victim's injuries were the result of accident, they are not entitled to raise self-defense. *Id.* at 439. Moreover, it is proper for a prosecutor to invite the jury to review the evidence and determine whether there is corroborating evidence to support the defendant's self defense claim. *State v. Murphy*, 107 Wn.App. 328, 338

26P.3d 1017 (Div 3, 2001). A prosecutor may "comment on the lack of evidence since it is the defendant's burden of producing evidence to support the elements of self-defense." *Id.*

In the present case, the defendant claimed he pushed Everett away from him and his cast caused the marks on Everett's neck. He never agreed that he choked or strangled her. As such, the State properly argued he could not raise self-defense to the strangulation. Moreover, the State properly questioned the credibility of the defendant's evidence to argue the defendant did not use self-defense, so any level of force was not lawful.

The Defendant cites to *State v. McCreven*, 170 Wn.App. 444, 284 P.3d 793 (Div 2, 2012) as an example of burden shifting without citing to the facts of *McCreven*. In *McCreven*, the trial court incorrectly instructed the jury as to the level of the degree of threat of injury for self-defense to felony murder and incorrectly instructed it was the defendants' burden to prove it by a preponderance. *Id.* at 463-64. The prosecutor cited to these incorrect instructions during closing. *Id.* at 469-70. The court of appeals stated the State could not comment on the lack of defense evidence because the defense had no duty to present evidence. *Id.* at 470. As such the State's misleading comments in closing suggested the defendants must first prove self-defense to the jury and that that the State could not

disprove the affirmative defense. *Id.* It does not appear from the facts of *McCreven* that the defendant(s) testified. The appeals court found there was burden shifting and the trial court erred in not given an instruction and sustaining the objection. *Id.* at 471.

In the present case the court property instructed the jury. The State argues to the jury the State's evidence showed there was no lawful force. RP 465. Moreover, the Defendant's version of the events was unconvincing, so the State did not have disprove lawful force. This is appropriate argument under the facts of the case and the law.

The defendant did not object to the argument and cannot show an instruction would not have cured any error. Moreover, the Defendant cannot prove a substantial likelihood that any misconduct affected the jury verdict as it is obvious the jury carefully considered all the evidence in rejecting the charge of Assault in the second degree.

II. OFFICER SHELTON TESIMONY WAS A REITERATION OF THE EVIDENCE RULE CONCERNING EXCITED UTTERANCES AND NOT OPINION EVIDENCE.

The Defendant argues Officer Shelton gave improper opinion testimony when he spoke about the things he is trained to look for in domestic violence cases and referring to Ms. Even-Tash as the "victim."

The Defendant equates Shelton's testimony to profile testimony and cites to *State v. Braham*, 67 Wn.App. 930, 841 P.2d 785 (Div 1, 1992), for the ground that profile testimony has little probative value. According to *Braham*, a lack of objection to profile testimony fails to preserve the issue for appeal. *Id.* at 935. However should the court consider the issue the testimony was proper.

The testimony in Braham was an expert in child sex offenses speaking to how a defendant will groom a child. *Id.* at 937. The court talked about placing a defendant in a certain group and how statistics and characterizations of defendants in the group without connecting evidence in the case is of little value. *Id.* at 936-37. However, Division one also indicated that it could see instances where such testimony would have value. In a footnote the court stated:

> in an appropriate case, grooming evidence could conceivably be used to explain a victim's behavior. In *Petrich*, for example, an expert was permitted to explain the reasons for a child victim's delay in reporting abuse. In response to a challenge to the victim's credibility, the expert's testimony was proper because it helped the jury understand that seemingly counterintuitive behavior of a victim was scientifically explainable. *See* 101 Wash.2d at 575–76, 683 P.2d 173. Thus, in a case where the victim has not reported alleged abuse immediately as A.H. did, but has instead been beguiled into silence for a long period of time, it may be a proper exercise of discretion to permit expert testimony on some of the "grooming" dynamics.

State v. Braham, 67 Wn.App. 930, 937, fnt 5.

In the present case, the State presented evidence of Everett's initial call to 911, her subsequent uncooperative behavior with the police, her refusal to write a written statement and the jury ultimately was aware of her recantation and several different stories. In accordance with *Braham*, Officer Shelton's testimony that victims have concerns which affect their story and cooperation was helpful for the jury in understanding the dynamic and reasons why a victim might later change their story. RP 99.

Additionally, Officer Shelton's testimony mirrors the idea behind Evidence Rule 803 for excited utterances. His testimony that a victim is still caught up in the excitement of the event and their statement is closest to the truth is exactly why these statements are considered reliable and admissible. The jury is allowed to consider the circumstances surrounding a statement in weighing the credibility of a statement. It would proper for the State in closing argument to argue because Everett was under the excitement of the evidence she wouldn't have time or the fore-thought to make it up.

Moreover, Officer Shelton's "aura of reliability" is only that of a first responder on scene. The jury obviously understands that Shelton considered Everett a victim on the basis of Everett's own statements and his use of the term victim did not carry any additional weight. Moreover, the jury did not find the defendant guilty of assault in the second degree.

Had they truly been convinced by Officer Shelton's statements they would have found Olson guilty of the greater crime based upon Shelton's testimony as to the strangulation and the evidence Olson cites as opinion evidence.

III. THE TRIAL COURT DID NOT ERR AS THERE WAS NO JUROR MISCONDUCT

The Defendant argues the jury pre-maturely deliberated as they requested to listen to the 911 CD prior to closing arguments. However, there is no error in the jury listening to the evidence a second time, the State intended to play the CD again, and the Defendant did not object nor request the court conduct an inquiry.

The Defendant cannot prove from the record when the jury request was made, only when it was communicated to the court. RP 392. Moreover, the Defendant cannot prove it evidenced a pre-formed opinion as to the evidence of guilt. If the jury had immediately wanted to listen to the CD because someone could not hear or requested to hear it in deliberation, there is no reason to believe the court should not replay it. *State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126 (1983). The Defendant is wholly guessing what was in the jury's mind prior to deliberation and it is obvious the jury carefully considered all the evidence in the verdict it rendered.

A party petitioning for a new trial on the grounds of premature deliberations must establish that the communication prejudiced the outcome of the trial. *Tate v. Rommel*, 3 Wn.App. 933, 938, 478 P.2d 242 (1970). In *Tate*, the defendant submitted several affidavits from a third party stating that one of the jurors told him on the first day of trial that the defendant "certainly was hurt" and the juror "certainly believed that Rommel should have to pay Tate". *Id.* at 934. The trial court's order granting a new trial was reversed on appeal for lack of a showing that the prematurely formed opinion affected the outcome of the trial. The court reasoned that a juror, or judge, may well form preliminary opinions about a case before deliberations begin. While such opinions should not be revealed and normally are not, interrogating a juror about the premature revelation of an opinion opens the door to undue interference with the thought processes of other jurors, and therefore should not be undertaken unless there is a showing of prejudice:

> The *mere* revealing of an opinion, as to the ultimate outcome of a trial by an otherwise unbiased juror, before submission of the case to the jury, based upon evidence properly received, while not to be condoned, does not, standing alone, constitute such misconduct as to justify the granting of a new trial. There must be a further showing that such conduct prejudiced the outcome of the trial.

Id. at 937-938.

Additionally, in *State v. Hatley*, 41 Wn.App. 789, 706 P.2d 1083 (1985), a juror allegedly told a third party during trial that the defendant was "guilty as sin." *Id.* at 792. The court found that while it was misconduct for the juror to express his opinion of guilt prematurely, there was no showing that the misconduct prejudiced the defendant's right to a fair trial. *Id.* 794-95.

Premature deliberations, although improper, are not as serious as extra-jury influences such as private communication, contact, tampering with a juror during trial, or media influence. *Davis v. Woodford*, 384 F .3d 628, 653 (9th Cir.2003).

It follows, that if an allegation of premature deliberation does not on its face establish prejudice to the defendant's right to a fair trial, the trial court has the discretion to decide against trying to establish the nature and extent of the discussion that took place among the jurors.

In the present case, Olson cannot establish prejudice, nor a violation of the court's discretion not to conduct an inquiry.

IV. THE COURT DID NOT COMMENT ON THE EVIDENCE AS IT USED ITS DISCRETION IN ALLOWING THE PLAYING OF THE 911 CD

The Defendant argues the trial court abused its discretion in playing the 911 CD after the jury requested to hear it again. There is NO evidence of violation of discretion as the court inquired into the way it was

going to be played, the defendant did not object, and the CD was only played one time prior to the closing arguments and the jury was not given the means to listen to the evidence on their own. In accordance with *State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126 (1983), a case directly on point and not cited by Defendant, the court did not err.

The Defendant's citation to *State v. Koontz*, 145 Wn.2d 650, 41 P.3d 475 (2002), is hardly instructive and most easily distinguished. In *Koontz*, the jury was deadlocked and asked to view trial testimony again. The court, over Koontz's objection, allowed them to view three witnesses entire testimony and instructed them not to give undue emphasis to the testimony. *Id.* at 653. The Washington Supreme Court noted the unique nature of video-taped testimony and the manner of video replay. *Id.* at 657. The court specifically distinguished tape recordings as exhibits like those in *Frazier*, and like the 911 recording in Olson. As such, *Koontz* does not apply to the present case.

V. THE DEFENDANT FAILS TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL.

The Defendant argues ineffective assistance of counsel for counsel's failure to object to the numerous violations Olson raised in his brief above. The standard of *de novo* review is applied to claims of

ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

a. Burden of proof and test for ineffective assistance claims

When a defendant raises a claim of ineffective assistance of counsel, he bears the burden to show (1) defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances: and (2) defense counsel's deficient representation prejudiced the defendant such that there is a reasonable probability that, except for counsel's unprofessional errors, the results of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)).

There is a strong presumption defense counsel's conduct is not deficient and judicial scrutiny must be highly deferential. *Id.*, *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

The relevant question is whether counsel's choices were reasonable, not whether they were strategic. *McFarland*, 127 Wn.2d at 34. Competency of counsel is based upon the entire record below, however consideration is limited only to the record. *Id.* at 335, *Grier*, 171 Wn.2d at 29. If a defendant needs to rely on evidence outside the record, they may file a concurrent personal restraint petition. *Id.*

b. The Defendant fails to prove ineffective assistance of counsel

The Defendant cannot prove ineffective assistance of counsel for failing to object to all the issues cited above as the admission of such evidence and argument were proper. Moreover, he never argues the outcome of the trial would have been different had defense counsel acted differently. It is obvious that counsel was effective as the jury did not convict Mr. Olson of the felony, but rather the misdemeanor.

VI. THE COURT DID NOT ERR IN ORDERING OLSON TO PAY FEES FOR ANYTHING OTHER THAN THE DNA FEE, AS THE CRIME WAS A LESSER-INCLUDED OFFENSE.

The Defendant argues the court should not have ordered Olson to pay fees that could possibly be attributable to the felony for which he was acquitted.

However, *State v. Baggett*, 103 Wn.App. 564, 13 P.3d 659 (Div 3, 2000) and *State v. Buchanan*, 78 Wn.App. 648, 898 P.2d 862 (Div 1, 1995), directly state when a defendant is convicted of a lesser-included offense arising from the same facts of the greater charge, the court may properly order the defendant to pay associated costs with the greater charge.

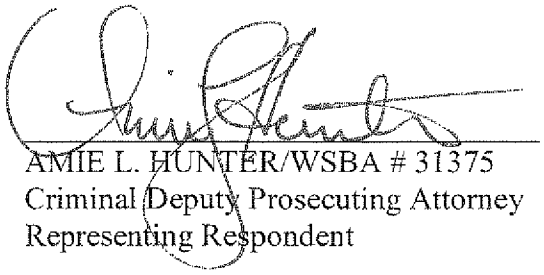
In the present case, the Defendant wants the court to slice and dice costs associated with defending against a misdemeanor versus a felony charge. This is impossible and invites ridiculous inquiry as there were not separate charges, but rather a lesser-included offense. The same can be said for the jury demand fee. The State must concede that RCW 43.43.754 does not authorize the DNA fee and allow for remand to strike this fee.

V. CONCLUSION

The court should deny the Defendant's grounds for reversal as cited above. However, should the court find error, the court should reverse the finding of guilt and allow the State to retry the defendant on the Assault in the second degree charge as the Jury clearly indicated it could not decide on the Assault second charge.

Respectfully submitted this 22 day of October, 2013.

SUSAN I. BAUR
Prosecuting Attorney

By: 

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 23rd, 2013.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

October 23, 2013 - 10:47 AM

Transmittal Letter

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